BRIEF OF RESPONDENTS.

ADDITIONAL STATEMENT OF THE CASE.

Counsel for petitioner in their Statement of the Case have not fully set forth the facts, and we supplement same as follows:

(1) In addition to the portion of the opinion of the Circuit Court of Appeals quoted by counsel we quote from said opinion as follows:

> "By signing the instrument and returning it to the Chicago attorneys to be placed in escrow, defendant accepted plaintiff's proposal and assented to all its terms as expressed in the formal executed agreement. Thereby a binding agreement wherein the minds of the parties had fully met came into existence.
>
> True, the document was not taken to the escrow agent but such delivery was not a condition precedent to the binding effect of the executed agreement. It was merely specification of the means by which the contract was to be performed and was material only as it affected the rights and remedies of the parties arising subsequent to execution. The agreement itself provided that the document should be delivered to the escrow agent after it had been executed. The party who retained the executed contract was under obligation to deliver it to the escrow agent. Failure of defendant to do so amounted to a breach to that extent for which it became liable to plaintiff." (T. 251,252.)

(2) The evidence of the plaintiff (T. 117) shows that on May 28, 1942, the day Britton received the signed con-

tract back from the defendant, Britton called Cohen on the telephone and said that the last document that Cohen had signed was returned to his (Britton's) office, that Cohen then said, "I will come over to your office, Lester, and we will deliver the paper to Hall & Ellis," and Britton then said, "You won't have to do that. I have sent it over by messenger at once." That Cohen then said, "Will you please send me a copy of the document and a verification of that fact?" and that Britton said he would. Then, Britton did mail Cohen a verification of the fact that he had sent the contract to Hall & Ellis and enclosed a copy of the contract.

(3) After the original contract signed by both parties had been received by the attorneys for petitioner, and after the telephone conversation between Cohen and Britton on May 28, 1942, Britton, who was one of the attorneys for petitioner mailed a letter to Cohen dated May 28, 1942, which letter was addressed to said Cohen and was headed "Re: Premises at Wabash and Van Buren Streets." and which contained the following:

> "We send you herewith copy of contract of purchase and sale between you and New England Mutual Life Insurance Company.
>
> We have delivered the executed original contract to Messrs. Hall & Ellis to be held by them in escrow as provided in the contract." (T. 118, 119.)

We, therefore, deny the statement of counsel for petitioner set up on p. 8 of their petition that "the narrow issue is thus presented as to whether petitioner merely by signing the instrument and returning same to its own attorneys accepted the offer, notwithstanding the fact that the instrument at all times thereafter remained in the possession of petitioner's own attorneys."

We further deny that the Circuit Court of Appeals held any such proposition in the form as is presented by counsel for petitioner. In fact the petitioner did not in its original briefs filed in the Circuit Court of Appeals raise the point in the form now presented by it. Counsel for petitioner raised the point here presented for the first time in their petition for rehearing filed in the Circuit Court of Appeals. The point originally raised in the Circuit Court of Appeals by petitioner was that delivery of the contract to Hall & Ellis was a condition precedent to the contract becoming binding between the parties. In raising this point counsel for petitioner urged the claimed fact that the signed contract remained in the possession of its attorneys, as grounds for urging that the contract was never delivered to Hall & Ellis. Counsel for petitioner have thus changed the form but not the substance of their contention before the Circuit Court of Appeals that the contract never became in force as a binding contract because it was never delivered to Hall & Ellis. But the point now raised is really the same point in different words.

SUMMARY OF ARGUMENT.

I. Petitioner does not come within the class of cases referred to in Rule 38 (5) of this Court. They do not cite any authority, local or federal, in conflict with the decision of the Circuit Court of Appeals.

II. The decision of the Circuit Court of Appeals is in strict accord with all established authorities, local and federal.

III. There is no difference between the questions as to whether delivery of the contract to Hall & Ellis was essential to a valid acceptance, and whether relinquishment of possession and control by petitioner's attorneys was essential to a valid acceptance.

IV. Petitioner agreed with plaintiff in the executed contract and also through its attorneys upon receipt of the executed contract by petitioner's attorneys that the duplicate executed agreement would be delivered to Hall & Ellis. There was a duty on petitioner to deliver the executed contract to Hall & Ellis, and petitioner cannot plead its own default in keeping that agreement.

V. Petitioner is estopped to deny that the executed contract did not leave the possession of its attorneys.

VI. No delivery of the contract to Cohen was contemplated between the parties, and delivery of same to Cohen was not necessary. Petitioner gave notice to Cohen through its attorneys of the acceptance of the contract by petitioner, and the contract became complete between the parties without any delivery to Cohen.

ARGUMENT.

I.

Petitioner does not come within the class of cases referred to in Rule 38 (5) of this Court. They do not cite any authority, local or federal, in conflict with the decision of the Circuit Court of Appeals.

This case does not come within the class of cases referred to in Rule 38 (5) of this Court. The questions presented here involve contract and local law. Hence, under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, as interpreted by this Court in *Ruhlin* v. *New York Life Ins. Co.,* 304 U.S. 202, petitioners are required to show the existence of a real conflict between the decision of the Circuit Court of Appeals and local decisions in Illinois. In *Ruhlin* v. *New York Life Ins. Co., supra,* at page 206, this Court said:

> "The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' "

There is no conflict between the decision of the Circuit Court of Appeals and applicable local decisions on the question that when an executed contract is delivered to one of the parties under an agreement that the contract shall be deposited in escrow by the party holding same, that the failure of the party so receiving and holding the executed contract to deliver the contract in escrow, cannot be pleaded as grounds for claiming that the contract never became effective because of its non-delivery.

It was held in *Hamilton Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, that jurisdiction to review the judgments and decrees of the Circuit Court of Appeals by certiorari is to be exercised sparingly, and only in cases of gravity and general importance, or in order to secure uniformity of decision.

It was held in *U. S.* v. *Johnston*, 268 U.S. 220, that certiorari will not be granted to review evidence and discuss specific facts. In this case the Court would have to consider the facts and determine same before a decision could be rendered on the applicable law.

We submit therefore that this case does not come within the class of cases referred to in Rule 38 (5), and that the petition for a writ should be denied.

II.

The decision of the Circuit Court of Appeals is in strict accord with all established authorities, local and federal.

Cohen signed the contract in duplicate and placed both copies in the hands of petitioner's attorneys. Petitioner's attorneys forwarded this signed contract to Boston, where petitioner executed both copies, retained one copy in Boston and forwarded the other copy to their attorneys in Chicago. Petitioner said in its letter of May 26, 1942, to its attorneys at Chicago: "We acknowledge receipt of your letter of May 22, and return herewith duplicate original of signed contract for the sale of above-mentioned premises and copy thereof for your file. The original we are retaining here." (T. 57.)

Upon receipt of this duplicate original, Britton, who was one of petitioner's attorneys, called Cohen and notified him that the contract had been executed by petitioner and that he was immediately delivering the executed copy he

had received to Hall & Ellis. Cohen said he would like to walk over and deliver same to Hall & Ellis with Britton, and Britton said that would not be necessary because he had already sent the contract over by messenger to Hall & Ellis.

No delivery of the duplicate original of the executed contract forwarded to petitioner's attorneys was thus to be made to Cohen. Cohen was never to receive an executed copy of the contract, but same was to be delivered in escrow to Hall & Ellis. The Circuit Court of Appeals in its opinion held that where Cohen had executed the contract in duplicate and delivered it to petitioner's attorneys, that when petitioner executed the contract in duplicate and forwarded the duplicate contract to its Chicago attorney, to be deposited in escrow, that a duty arose on petitioner to carry out the terms of the contract and deliver it in escrow.

Also, upon receipt of this executed duplicate original petitioner's attorney, Britton, notified Cohen of the execution of the contract and stated he was immediately delivering it to Hall & Ellis, and he confirmed that telephone statement in his letter.

Everything that could be done then had been done, and petitioner could not subsequently retract everything that had been said and done and say that it had not delivered the duplicate original to Hall & Ellis.

In the case of *United States* v. *P. J. Carlin Construction Company,* 224 F. 859, (pp. 862, 863) the Court said:

> "If the Court can see from the writings or correspondence that the minds of the parties have met, that a proposal has been submitted by one party which has been accepted by the other, and that the terms of the contract have been in all respects definitely agreed upon, one of the parties cannot evade or escape from

his obligation by refusing to sign the formal contract, which the parties understood was subsequently to be drawn and executed."

In the case of *Barneby* v. *Barron G. Collier, Inc.*, 65 F. (2d) 864, the Court said (p. 868):

"It is also urged by defendants that the contract sued upon was not accepted by plaintiff before notice of cancellation was received from defendants. The testimony on behalf of defendants tended to show that they had not received an acknowledgment of the contract from the plaintiff. The contract itself contains the recital that 'This contract has been reduced to writing and has been executed first by the Advertiser, and afterwards, in New York, N. Y., by the Advertising Company.' At the bottom of the contract, above the signatures of the parties, appear the words, 'Signed in duplicate,' under which appear the words, 'Accepted in duplicate July 31, 1929, Barron G. Collier, Inc., J. C. Ramsay, Asst. Sec'y.' The contract itself imports its completed execution by the parties thereto. It was, as the instrument itself recites, first executed by the defendants. They signed the contract in Omaha, and it appears from the recitals thereof that at the time they signed it it was in the contemplation of the parties that it should afterwards be signed by the plaintiff in New York. Under these circumstances it was clearly within the contemplation of the parties that the mails should be used as a means of communicating the acceptance of the contract. It appears without dispute that plaintiff accepted the contract in New York, not later than the 3d of August, 1929, before defendants claim to have given any notice of its cancellation. It was accepted in the manner contemplated by the parties, and it appears that the assistant secretary of plaintiff, after indorsing an acceptance

on the contract on the 3d of August, 1929, mailed a copy of same to defendants, retaining one copy in the office of plaintiff."

The law is very plain that if a contract is executed in the manner contemplated by the parties that the contract becomes in force. In the present case it was contemplated by the parties that Cohen would execute two copies of the contract, deliver them to petitioner's attorneys, these attorneys would mail them to petitioner at Boston, that petitioner upon receipt of same would execute both copies, retain one and mail a duplicate original to its attorneys to be deposited in escrow with Hall & Ellis, and that the attorneys would deposit this duplicate original with Hall & Ellis. In no part of this program was Cohen to have delivered to him an executed copy of the contract. Although Britton said to Cohen he had delivered the executed copy to Hall & Ellis and wrote him a letter containing that statement, it was contended on the trial of this cause that Britton was mistaken when he stated he had delivered the contract to Hall & Ellis and when he wrote in his letter to Cohen that he had delivered the contract to Hall & Ellis.

Even assuming that Britton did not deliver the contract to Hall & Ellis the sole question involved was whether the failure to deliver the executed duplicate contract to Hall & Ellis prevented the contract remaining in force when it was plainly the duty of petitioner to deliver the contract to Hall & Ellis.

The *Carlin* case above cited shows that a contracting party cannot evade his responsibility under an agreement by failing to sign a contract when he has agreed so to do. Numerous cases to this effect can be cited.

The *Barneby* case above cited is very much similar to the case at bar and holds that when an agreement is handled

in the manner contemplated by the parties that a valid contract is entered into by the parties.

None of the cases cited by counsel for petitioner are in point under the facts here involved. No delivery to Cohen was to be made of the contract, so the cases cited in petitioner's brief which hold that delivery must be made are not in point.

We submit that the decision of the Circuit Court of Appeals is in strict accord with all established authorities, local and federal.

III.

There is no difference between the question as to whether delivery of the contract to Hall & Ellis was essential to a valid acceptance, and whether relinquishment of possession and control by petitioner's attorneys was essential to a valid acceptance.

Counsel say in italics on p. 11 of their petition that "Carried to its logical conclusion the opinion of the Court as it now stands means that a party cannot sign a document and leave it with his own attorney, because possession by his own attorney is no longer to be regarded as the possession and control of the party himself."

This is a deliberate misstatement of the facts in this case. It is undoubtedly the law that if a party places a paper in the hands of his attorney or agent that it is not delivered until delivery of the paper is made. But in this case you can eliminate the attorneys entirely and the legal situation does not change. Eliminating the attorneys in the transaction, we have a case where Cohen signed the contract in duplicate and delivered the two signed contracts to petitioner. Petitioner was to sign both, retain one and deliver a duplicate original in escrow. No signed copy was to be delivered to Cohen. Petitioner actually

signed both contracts retaining one of the signed copies and caused an agent to notify Cohen that the contract was accepted and that the duplicate original contract had been delivered to Hall & Ellis.

Under these circumstances the only question involved is whether the failure to deliver a signed copy to Hall & Ellis, although the signed contract provided that it should be deposited with Hall & Ellis, prevented the contract from coming into force. On this question the Circuit Court of Appeals, passed, and no question of relinquishment of the signed contract by petitioner's attorneys can enter into a decision of this case. Counsel attempt to be adroit when they talk about relinquishment of possession of the contract, but they are not adroit when they claim that failure to deliver the executed duplicate contract to Cohen prevented the contract from coming into force, because Cohen was never to have delivery of the executed duplicate contract.

No change of front or shuffling of words can alter the fact that when possession of the contract was to be relinquished by petitioner's attorneys that possession was only to be relinquished to Hall & Ellis and never to Cohen. So when counsel refer to relinquishment of possession of the contract they can only refer to relinquishment of possession to Hall & Ellis, and we come back to the same point of whether failure to relinquish possession to Hall & Ellis prevented the contract from being in force.

We, therefore, submit that there is no difference between the question as to whether delivery of the contract to Hall & Ellis was essential to a valid acceptance, and whether relinquishment of possession and control by petitioner's attorneys was essential to a valid acceptance.

IV.

Petitioner agreed with plaintiff in the executed contract and also through its attorneys upon receipt of the executed contract by petitioner's attorneys that the duplicate executed agreement would be delivered to Hall & Ellis. There was a duty on petitioner to deliver the executed contract to Hall & Ellis, and petitioner cannot plead its own default in keeping that agreement.

An examination of the evidence herein shows that the only provision "for the delivery of the contract and the earnest money in escrow" is contained in the formal contract signed by the parties. This provision in the contract is as follows:

> "This contract and the earnest money shall be held in escrow by Hall & Ellis for the mutual benefit of the parties hereto, and after consummation of sale the cancelled contract may be retained by the escrowee." (Plaintiff's Exhibit 4.)

The evidence of the plaintiff (T. 117) shows that the day that Britton received the signed contract back from the defendant, that Britton called Cohen on the telephone and said that the last document that Cohen had signed was returned to his (Britton's) office, that Cohen then said, "I will come over to your office, Lester, and we will deliver the paper to Hall & Ellis," and Britton then said, "You won't have to do that. I have sent it over by messenger at once"; that Cohen then said, "Will you please send me a copy of the document and verification of that fact?" and that Britton said he would.

Under this evidence, plaintiff and the defendant through its attorney Britton made an arrangement or agreement that Britton had or would immediately send the signed contract over to Hall & Ellis. Britton assured plaintiff

that it was not necessary for him to come over to Britton's office and walk with him to the office of Hall & Ellis in order to immediately deposit the signed contract with Hall & Ellis. So plaintiff acquiesced and agreed with Britton that he would not come over to Britton's office but that Britton would assume the responsibility of delivering the signed contract immediately to Hall & Ellis.

Under the above evidence and the provisions of the executed contract the Circuit Court of Appeals correctly held that there was a duty on the defendant to deliver it to the escrow agent. The failure of Britton to keep his agreement with Cohen and the failure of petitioner to deliver the contract as provided in said contract cannot be taken advantage of by petitioner. Clearly the failure of Britton to deliver the contract was a breach of contract, and the claim of petitioner that the contract never left the possession of its attorneys amounts to a claim that defendant's own breach of contract in the failure to deliver the contract can be pleaded in defense of respondents' right. The law does not permit a person to thus take advantage of his own wrong.

We submit that there was a duty on the defendant to deliver the contract to Hall & Ellis as shown by the evidence herein, and a failure of defendant to comply with that duty by retaining possession of the signed contract cannot be pleaded in defense.

V.

Petitioner is estopped to deny that the executed contract did not leave the possession of its attorneys.

It may very well be considered that the defendant is estopped to deny that the signed contract did not leave the possession of Pám, *et al.* As pointed out in the evidence of respondents above quoted, Britton said that Cohen would

not have to come over to Britton's office because "I have sent it over by messenger at once." And again, in the letter from Britton to Cohen after that conversation on the telephone (Plaintiff's Exhibit 14A), Britton said:

> "We have delivered the executed original contract to Messrs. Hall & Ellis to be held by them in escrow as provided in the contract."

So we have two statements by Britton, one verbal and one in writing stating that he had already delivered the signed contract to Hall & Ellis. May we not accept these statements made out of court at a time when no lawsuit was contemplated as the real truth? Do they not effectively contradict the testimony of Britton that he did not actually deliver the contract to Hall & Ellis as previously stated by him? It certainly requires no stretch of the imagination to believe that Britton could have taken the contract back after delivery to Hall & Ellis who were the agents of petitioner.

Ralph M. Strader who was connected with Hall & Ellis, and who supervised the real estate holdings of petitioner (T. 133) testified that Britton informed him a few days after Britton wrote the letter of May 28, 1942, which stated "We enclose herewith ~~executed in duplicate,~~ contract between Benjamin E. Cohen and New England Mutual Life Insurance Company for the sale of the property formerly securing the Sage loan at 405 South Wabash Avenue for $85000. This contract, in accordance with its provisions is to be held in escrow with the earnest money for the benefit of the parties." (Plaintiff's Exhibit No. 11, T. 148, 149); that Britton told him he had written the letter and sent it. (T. 148.)

The above evidence proves that the contract was actually sent to Hall & Ellis under three statements of Britton all made prior to this suit being filed.

We submit that under these circumstances petitioner cannot now contend that the duplicate original contract was not in fact delivered to Hall & Ellis.

VI.

No delivery of the contract to Cohen was contemplated between the parties, and delivery of same to Cohen was not necessary. Petitioner gave notice to Cohen through its attorneys of the acceptance of the contract by petitioner, and the contract became complete without any delivery to Cohen.

The defendant through its attorney, Britton, gave notice of the acceptance of the contract by petitioner, and it was agreed that Britton should send Cohen a letter containing a copy of the signed contract. This agreement made the contract between the parties complete. Delivery of the duplicate executed contract to Cohen was not ever contemplated by the parties and therefore delivery was not necessary. The contract was only to be delivered to Hall & Ellis. If notice of acceptance by petitioner was required, it gave the notice through Britton over the telephone and by the letter sent by Britton to Cohen enclosing a copy of the contract.

The law is well settled that notification of acceptance is sufficient by telephone conversation or in any other manner.

In the case of *Sinaiko* v. *Illinois Smelting & Refining Co.*, 215 Ill. App. 108, the Court said (pp. 111, 112):

> "We see no escape from the conclusion that the contract was made over the telephone. But, even if written confirmation were necessary, the mailing of the letter of December 5 made the contract complete. The mailing of a letter of acceptance constitutes *ipso facto*, acceptance (*Haas* v. *Myers*, 111 Ill. 421; *Chytraus* v.

Smith, 141 Ill. 231), and 'acceptance concludes the contract'; and, subsequently, revocation, *ex parte,* becomes impossible. Anson, Law of Contracts (2nd Am. Ed.) p. 37."

In *Cottingham* v. *National Church Ins. Co.,* 290 Ill. 26, the Court said (p. 32):

> "So a contract is complete when an unqualified assent to the offer of one of the parties is dropped in the post-office properly directed and stamped by the other party, unless the offer is so qualified as to require the actual receipt of the letter of acceptance before the agreement is complete."

In the case of *Wagner* v. *McClay,* 306 Ill. 560, the Court in passing on this point said (p. 563):

> "On the question of the sufficiency of the acceptance of the offer the authorties cited are to the effect that when a letter of acceptance is deposited in the mail, properly addressed and stamped, it will be considered that the acceptance is binding, while the revocation of an option contract only operates from the time it is received by the one to whom it is sent and has no legal effect prior to that time. (1 Elliott on Contracts, secs. 44, 34, and note on p. 53.)"

CONCLUSION.

The decision of the Circuit Court of Appeals is clearly correct. Its decision is in accord with all decided cases on the point involved. Counsel for petitioner have not cited a single case holding to the contrary. Counsel by their petition have attempted to make the Circuit Court of Appeals decision say something that it does not say, and the whole petition is based upon a clearly erroneous claim as to what the Circuit Court of Appeals did decide.

We submit that no question is presented to this Court which justifies the issuance of a writ of certiorari under Rule 38 (5), or any of the other rules governing the granting of such writs. The petition should therefore be denied.

Respectfully submitted,

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